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**DEPARTMENT OF STATE REVENUE**

**LETTER OF FINDINGS NUMBER 01-0263**

**INCOME TAX**

**For Tax Period: 1997**

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## Issue

**Adjusted Gross Income Tax: Throwback Sales**

**Authority:** 15 U.S.C.S. 381, IC 6-3-1-25, IC 6-8.1-5-1 (b), 45 IAC 3.1-1-64, Indiana Department of State Revenue v. Continental Steel Corporation, 399 N.E.2d 754 (Ind. Ct. App. 1980), Wisconsin Department of Revenue v. William Wrigley, Jr., Co., 112 S.Ct. 2447 (1992).

The taxpayer protests the imposition of tax pursuant to the throw-back rule.

## Statement of Facts

The taxpayer designs, manufactures, and markets liquid electrostatic paint application equipment. The taxpayer has employees who represent it in various locations. It also contracts for a manufacturer's representative who is employed by a French concern to represent it in Europe and a manufacturer's representative who is employed by a Thai concern to represent it in Asia. In an audit, the Indiana Department of Revenue, hereinafter the "department," assessed adjusted gross income tax on the receipts from sales that originated in Indiana and were delivered to several foreign countries where the taxpayer has no nexus requiring the filing of income tax returns. The taxpayer protested this assessment and a hearing was held.

## Discussion

15 U.S.C.S.381 (Public Law 86-272) prohibits states from imposing a net income tax on a foreign taxpayer if the foreign taxpayer's only business activity within that state is the solicitation of sales. A state may not impose an income tax on income derived from business activities within that state unless those activities exceed the mere solicitation of sales. 15 U.S.C.S. 381 (a), (c). The effect of the throw-back rule is to revert sales receipts back to the state from where the goods were shipped in those situations where 15 U.S.C.S. 381 deprives the purchaser's own state of the power to impose a net income tax. 45 IAC 3.1-1-64. In effect, 15

U.S.C.S. 381 permits Indiana to tax out-of-state business, without violating the Commerce Clause and without the possibility of subjecting taxpayers to double taxation, because Indiana's right to tax those out-of-state activities is derivative of the foreign state's own taxing authority. In every sales transaction, at least one state has the authority to tax income derived from the sale of the tangible personal property; if the state wherein the sale occurred is forbidden to do so by 15 U.S.C.S. 381, then the income is "thrown-back" to the originating state.

For the purposes of determining whether a taxpayer is subject to the taxing jurisdiction of another state pursuant to 45 IAC 3.1-1-64, "the term 'state' means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof." IC 6-3-1-25. Accordingly, the jurisdictions at issue fall within the definition of a "state" and are properly considered as potentially subject to the throw back rule. *See also* IC 6-3-1-25.

The department must determine whether the taxpayer's employees' activities within the foreign jurisdictions exceed the 15 U.S.C.S. 381 benchmark of "mere solicitation." Indiana Department of State Revenue v. Continental Steel Corporation, 399 N.E.2d 754 (Ind. Ct. App. 1980), defines those activities which do and do not exceed the "mere solicitation," standard. In that case, the court held that, "solicitation should be limited to those generally accepted or customary acts in the industry which lead to the placing of orders not those which follow as a natural result of the transaction, such as collections, servicing complaints, technical assistance and training. . ." Id. at 759. Further, "solicitation must be limited to those acts which lead to the placing of orders and does not include those acts which follow as a result of the transaction." Id. The court set out examples of activity which exceeded "mere solicitation" including "giving spot credit, accepting orders, collecting delinquent accounts and picking up returned goods within the taxing state, pooling and exchanging technical personnel in a complex mutual endeavor, maintaining personal property and associated local business activity for purposes not related to soliciting orders within the taxing state." Id.

In Continental, the court held that the taxpayer's employees' activities within the foreign state exceeded solicitation because the taxpayer's employees' activities "[did] not lead to the placing of orders but follow[ed] as a natural result of transaction." Id. Those activities included the taxpayer's "salesmen making adjustment on complaints, [and] salesmen giving customers technical assistance. . . "Id.

The "mere solicitation" by a corporation's employees standard was refined by the Supreme Court in Wisconsin Department of Revenue v. William Wrigley, Jr., Co., 112 S.Ct. 2447 (1992). The Court concluded, "although solicitation covered more than what was strictly essential to making requests for purchases, the fact that an activity is performed by salespersons does not automatically convert that activity into solicitation." Id. at 2456-57.
All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b). The taxpayer submitted a significant amount of material concerning the activities of its employees in the foreign countries. This material substantiated that the taxpayer's employees had significant activities past mere solicitation and established nexus in Canada and Mexico. Therefore, Indiana is precluded from imposing corporate income tax on the income from Indiana sales to those jurisdictions.

The taxpayer was unable to sustain its burden of proving that its employees had significant activities past mere solicitation and established nexus in the other foreign jurisdictions. Receipts from Indiana sales to these other foreign jurisdictions were properly thrown-back and subjected to Indiana adjusted gross income tax.

## Finding

The taxpayer's protest to the tax assessed on income from sales to Canada, and Mexico is sustained. The remainder of the protest is denied.

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